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4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 UNITED STATES OF AMERICA,

7 Plaintiff,

8 -vs-

9 DAVID EMILE COLBERT,

10 Defendant.

No. 2:13-CR-0008-WFN-15

ORDER

11
12 Before the Court is the Government's Motion for Reconsideration of Court Order -
13 ECF No. 3097, ECF No. 3120. Defendant responded, ECF No. 3194. The Court
14 previously granted Defendant's request that the Government disclose to him all statements
15 of cooperating Defendants, including, but not limited to free talk reports, which the
16 Government previously provided to the Court to review in camera. ECF No. 3097
17 (amending ECF No. 3096). In the pending Motion, the Government asks the Court to
18 reconsider that ruling.

19 In support of its Motion, the Government relies largely on *United States v. Ruiz*, 536
20 U.S. 622 (2002), which held "the Constitution does not require the Government to disclose
21 material impeachment evidence prior to entering a plea agreement with a criminal
22 defendant," *id* at 633. The Court questions whether the holding of *Ruiz* is directly
23 applicable to this case. *Ruiz* addressed pre-guilty plea disclosures whereas, in this case,
24 Defendant's request is made post-guilty plea for purposes of preparing for sentencing.
25 Nevertheless, the Court acknowledges that the Supreme Court's reasoning in *Ruiz* might
26 offer some guidance to resolving the issue presented by the parties. *See id.* (noting that
27 disclosure of impeachment evidence is "more closely related to the *fairness* of a trial than
28 to the *voluntariness* of the plea").

1 The Court need not resolve the issue solely on *Ruiz*, however, because the Court
2 concludes that any information contained in the materials requested by defense counsel is
3 not material to sentencing. Other than *Brady* material, there is no constitutional right to
4 discovery. *Brady* requires disclosure of evidence that is both favorable to the accused and
5 material to either guilt or to punishment. The Court may not sentence a defendant based
6 on confidential information not disclosed to the defense. *See, e.g., United States v.*
7 *Weintraub*, 871 F.2d 1257, 1265 (5th Cir. 1989) (vacating the defendant's sentence and
8 remanding the case for a new sentencing hearing based on material withheld impeachment
9 evidence).

10 The Court has reviewed the draft presentence report [PSR], ECF No. 2986. The
11 Court concludes that the draft PSR does not hold Defendant accountable for drug
12 quantities or the conduct of coconspirators based on evidence not disclosed to defense
13 counsel. Rather, Defendant's conduct described in the draft PSR is derived from
14 surveillance, intercepted communications, and evidence found upon the execution of
15 search warrants. Defendant received all this material in discovery.

16 As noted above, specificity is important in sentencing. But the Government does
17 not intend to call witnesses at sentencing, ECF No. 3120 at 10, and the Court is unaware of
18 any other information concerning Defendant that will affect its sentencing decision.
19 Unless Defendant can point to information contained in the PSR that is based on non-
20 disclosed discovery, the free talk reports and statements of co-Defendants will not affect
21 sentencing and are not material to Defendant's punishment.

22 The Court has reviewed the file and the parties' briefing and is fully informed.
23 Accordingly,

24 **IT IS ORDERED** that:

25 1. The Government's Motion for Reconsideration of Court Order - ECF No. 3097,
26 filed November 26, 2014, **ECF No. 3120**, is **GRANTED**.

27 2. The Court's Order filed November 25, 2014, ECF No. 3097 (amending ECF
28 No. 3095), is **WITHDRAWN**.

1 3. Defendant's Motion for Discovery and Motion to Expedite, filed November 17,
2 2014, **ECF No. 3056**, is **GRANTED IN PART and DENIED IN PART**. Defense
3 counsel may review trial testimony of cooperating co-Defendants Sharita Horn and Gilbert
4 Madison. The Court previously approved funding to enable defense counsel to obtain
5 copies of these transcripts. The Government need not disclose to defense counsel
6 statements of cooperating co-Defendants, including, but not limited to free talk reports.

7 The District Court Executive is directed to file this Order and provide copies to
8 counsel **AND TO** United States Probation Officer Shane Moore.

9 **DATED** this 18th day of December, 2014.

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11
12 s/ Wm. Fremming Nielsen
13 WM. FREMMING NIELSEN
14 SENIOR UNITED STATES DISTRICT JUDGE

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